Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

CHANEY L. PHILLIPS,

*Petitioner,*

versus

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can the United States government enforce an order of restitution, through garnishment, for a debt which is not owed to the United States of America, but which is owed to a private entity?

2. Can the United States government apply the provisions of the Mandatory Victims Restitution Act for restitution of criminal acts occurring prior to the effective date of the act?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHANEY L. PHILLIPS, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

This case arises as a result of a criminal conviction in the United States District Court, Middle District of Louisiana, wherein the defendant, Chaney L. Phillips, was convicted on a nineteen count indictment. The Fifth Circuit Court of Appeals reversed Phillips' convictions on Counts 4-14 and remanded the entire case for resentencing. As a condition of his sentence, Phillips was subsequently ordered to pay restitution to three private entities: Sun Life Assurance Company of Canada; St. Helena Parish Assessor's Office; and Louisiana Assessors Insurance Fund.

The United States government, incidental to the criminal proceeding, in an attempt to collect the restitution ordered by the court, filed a garnishment proceeding against the defendant in the United States District Court, Middle District of Louisiana. The defendant filed a motion to have the garnishment discharged, which was denied by the Honorable James J. Brady, and the court entered partial final judgment on the United States' garnishment claim against Phillips' retirement account on June 13, 2001. The defendant timely appealed to the United States Court of Appeals, Fifth Circuit.

On July 22, 2002, the Fifth Circuit affirmed the Order and Judgment rendered by the United States District Court, Middle District of Louisiana. *See U.S. v. Phillips*, 303 F.3d 548 (5th Cir. La) (No. 01-30878).

It is upon said ruling that petitioner timely applies to this Honorable Court for a writ of certiorari.

## JURISDICTION

Petitioner seeks review by this Honorable Court of the ruling of the United States Court of Appeals, Fifth Circuit, rendered on July 22, 2002. Jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Sections 1651 and 2106, *et seq*., and the U.S.C.A. Constitution, Article III, § 2, cl.1.

The United States Court of Appeals, Fifth Circuit, has entered a decision in conflict with the decisions of other United States courts of appeals on this same issue which is of national importance, and jurisdiction of this Court is thereby further invoked.

## RELEVANT PROVISIONS INVOLVED

18 U.S.C. § 3613 (Civil Remedies for Satisfaction of an Unpaid Fine)

18 U.S.C. § 3663 (Order of Restitution)

18 U.S.C. § 3664 (Mandatory Victims Restitution Act)

28 U.S.C. § 3001-3308 (Federal Debt Collection Procedures Act)

28 U.S.C. § 3014 (Exempt Property)

U.S.C. Constitution of the United States, Art. I, § 9, cl.3 (Bills of Attainder and Ex Post Facto Laws)

Louisiana Statutes Annotated-Revised Statute 13:3881 (General Exemptions from Seizure)

## STATEMENT OF THE CASE

### A. Proceedings Below

This case arises as a result of a criminal conviction on several counts of a federal indictment in the United States District Court, Middle District of Louisiana. The defendant, Chaney L. Phillips, was subsequently ordered to pay restitution to three private entities as a condition of his sentence. In February 1999, the government used post-judgment collection remedies of the Federal Debt Collection Procedures Act to seek writs of garnishment, and on August 22, 1999, served notice upon Phillips that the government would garnish his retirement account with the Louisiana Assessors Association. Phillips later moved to discharge the garnishment and, while the district court found his request to be untimely, denied the motion on the merits.

The United States District Court for the Middle District of Louisiana held that the Mandatory Victims Restitution Act (MVRA) granted the government the authority to use its collection procedures, namely, a writ of garnishment, of the Federal Debt Collection Procedures

Act to enforce the victim restitution orders in favor of the private entities.

Phillips ultimately filed a timely appeal under 28 U.S.C. § 1292, but this appeal was dismissed for lack of jurisdiction. Based upon the district court's order being non-final and non-appealable because of a still pending though unrelated claim, and the district court had not certified a partial final judgment under FRCP Rule 54(b). In June 2001, the district court granted a subsequent Rule 54(b) motion for a partial final judgment.

The Fifth Circuit Court of Appeals, in an opinion of July 22, 2002, affirmed the judgment of the United States District Court in and for the Middle District of Louisiana.

## REASONS FOR GRANTING WRIT

**THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED TWO IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT. FURTHERMORE, THERE IS A CONFLICT BETWEEN VARIOUS CIRCUITS AS TO THESE QUESTIONS OF FEDERAL LAW WHICH REMAIN UNRESOLVED.**

## ARGUMENT

I. Can the United States government enforce an order of restitution, through garnishment, for a debt which is not owed to the United States of America, but to a private entity? In its opinion, affirming that of the United

States District Court of the Middle District of Louisiana, the Fifth Circuit Court of Appeals held that the government can enforce private restitution action through the FDCPA, an opinion that is not only in error, but in conflict with other United States courts of appeals. The United States is authorized by law only to enforce the collection of a restitution order when the debt is owed to the United States. The threshold issue, in the government's enforcing the restitution, is whether or not the debt is owed to the United States or to a private entity. In support of the defendant's position that the government is without authority to enforce the payment of a restitution order owed to the three private entities under the provisions of the FDCPA, the defendant relies upon *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), and *United States v. Rostoff*, 164 F.3d 63 (1st Cir. 1999). In both cases, the government, as here, attempted to enforce a restitution order through garnishment proceedings by implementing the FDCPA. The First Circuit Court of Appeals looked at the legislative history of the FDCPA and observed as follows:

> "IV. THE GRASP OF THE FEDERAL DEBT COLLECTION PROCEDURE ACT
>
> We turn now to the appeal in the civil case. That case began when the United States invoked the FDCPA and sought to compel Bongiorno to pay the arrearage owed as back child support. The government assumed that since Bongiorno had been ordered to make restitution of this sum as part of the punishment imposed in the criminal case, it had access to the FDCPA as a means of collecting the debt. The district court honored the government's assumption and granted a writ of garnishment. On appeal, Bongiorno maintains that the court should have defenestrated the civil

action because a restitution order issued pursuant to the CSRA is not a "debt" within the meaning of the FDCPA. We agree."

"A. THE FDCPA

Congress enacted the FDCPA as Chapter XXXVI of the Crime Control Act of 1990, Pub.L. No. 101-647, 104 Stat. 4933, effective May 29, 1991, thus creating a framework under which the United States might more efficiently collect *debts owed to it*. The framework includes procedures that the government can utilize to recover on, or secure, such debts, and to that extent relieves the federal sovereign's need to rely on a patchwork of state laws." See H.R.Rep. No. 101-736, at 23-25 (1990), reprinted in 1990 U.S.C.C.A.N. 6472, 6631-33; *see also Selbe v. United States*, 912 F.Supp. 202, 205 (W.D.Va. 1995). [emphasis added]

Continuing, the First Circuit Court of Appeal in *Bongiorno*, relying upon the legislative history, found as follows:

"Congress passed the FDCPA with an end game in mind: to 'lessen[ ] the effect of delinquent debts on the massive federal budget deficit now undermining the economic well-being of the Nation.' H.R.Rep. No. 101-736, *supra*, at 23, 1990 U.S.C.C.A.N. at 6631. Consistent with this goal, Congress 'defined ['debt'] broadly to include amounts owing to the United States on account of a direct loan or loan insured or guaranteed by the United States as well as other amounts originally due to the United States.' *Id.* at 28, 1990, U.S.C.C.A.N. at 6636. Notwithstanding this breadth of definition, Congress restricted the statute's grasp to those obligations owing to the

> federal government. *See* 28 U.S.C. § 3002(3), (15)." *Bongiorno, supra*. [emphasis added]

It is therefore obvious, as reflected by the opinion of First Circuit Court of Appeals, relying upon the legislative history of the FDCPA, that this statute was adopted for the well intended purpose only of facilitating the collection of debts owed to the United States government. This is exemplified by the definition of "debt" contained in the FDCPA, as follows:

> "(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or
>
> (B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale or real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost that is not owing under the terms of a contract originally entered into by only persons other than the United States;. . . ."

In *Bongiorno*, the government argued that the FDCPA specifically mentions "restitution" among the classes of included debt. The government, in the instant case, seeks to paint with the same broad brush and include "restitution" to a private entity. The Fifth Circuit Court of Appeals in its opinion of July 22, 2002, adopted this erroneous conclusion. However, in *Bongiorno*, the First Circuit Court of Appeals rejected this argument and pointed out that some restitution orders create debts that "owe beneficially to the federal government and thus fall within the purview of the FDCPA." The Court then goes on to cite specific instances where restitution may be made in favor of the

federal government, rather than to a private entity. Consequently, the term "restitution" contained within the definition of "debt" as defined by the FDCPA refers only to restitution that is "owing to the United States."

The government has argued, and the courts below accepted the argument, that the FDCPA must now be read in conjunction with the Mandatory Victims Restitution Act of 1996. This act, adopted in conjunction with the Antiterrorism and Effective Death Penalty Act, had the effect of amending 18 U.S.C. § 3664. The comparison to the language of the MVRA to the previous language of 18 U.S.C. § 3664 reveals that it does nothing more than provide mandatory duties upon the court to issue an order of restitution and to set up a mandatory procedure by which the probation officer, the government and the defendant obtain and provide the necessary information to determine the loss to the victim and the financial resources indicating the defendant's ability to pay. Previous to the adoption of the MVRA, these functions were discretionary rather than mandatory. However, nowhere in the MVRA is there any definitive language authorizing the government to collect restitution on behalf of a private entity.

More importantly, the MVRA did not change the definition of "debt" as defined by the FDCPA. Consequently, even after the adoption of the MVRA, the FDCPA can be implemented only to enforce debts that are "owing to the United States." Until such time as Congress changes the definition of "debt" within the meaning of the FDCPA, no implication derived from the MVRA is effective.

II. Can the United States government apply the provisions of the Mandatory Victims Restitution Act (18

U.S.C. § 3664) for restitution of criminal acts occurring prior to the effective date of the act? In its opinion, the Fifth Circuit Court of Appeals held that in applying the MVRA to criminal acts occurring prior to the MVRA's effective date does not violate the Ex Post Facto Clause of the United States Constitution. Not only does this decision conflict with the majority of the federal circuit courts, but conflicts as well with the opinion of the Fifth Circuit Court of Appeals in *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000), *reh. en banc den.*, 211 F.3d 595 (5th Cir. 2000). As pointed out in *Richards*, *supra*, those circuits holding that an application of the MVRA to a person whose criminal conduct occurred prior to its passage would violate the Ex Post Facto Clause of the United States Constitution are the Eleventh Circuit,[1] the Third Circuit,[2] the Ninth Circuit,[3] the Second Circuit,[4] the District of Columbia Circuit,[5] and the Eighth Circuit.[6]

The United States Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed" by Congress. U.S. Constitution art. I, § 9, cl.3. As noted in *Siegel*, *supra*, this Court has held that the Ex Post Facto Clause applies to offenses occurring before its enactment ". . . [and] disadvantage[s] the offender affected by it by

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[1] *United States v. Siegel*, 153 F.3d 1256 (11th Cir. 1998); 12 Fla. Law W.Fed. C92

[2] *United States v. Edwards*, 162 F.3d 87, 89-90 (3rd Cir. 1998)

[3] *United States v. Baggett*, 125 F.3d 1319, 1321-1322 (9th Cir. 1997)

[4] *United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997)

[5] *United States v. Rezaq*, 134 F.3d 1121, 1141 n.13 (D.C.Cir.), *cert. denied*, 525 U.S. 834, 119 S.Ct. 90, 142 L.Ed.2d 71 (1998)

[6] *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997)

altering the definition of criminal conduct or increasing the punishment for the crime." Of the multiple count indictment in this case, only Counts 18, 19 and 20 occurred subsequent to the effective date of the MVRA, April 24, 1996.

The court in *Siegel*, *supra*, dealt specifically with the issue of whether or not the imposition of restitution under the MVRA is an increased penalty as prohibited by the Ex Post Facto Clause. The court then noted that Section 3663(a)(1)(A) of Title 18 expressly describes restitution as a penalty under Section 3664(f)(1)(A). The court then went on to note that prior to the enactment of the MVRA, the district courts had the discretion to order "that the defendant make restitution to any victim of the offense." The court then rationalized that under the MVRA an award of restitution is no longer discretionary,[7] and further that the district court must order restitution in the full amount of each victim's losses without consideration of the defendant's economic circumstances.[8] As a result of the above, the court found that the effect of the MVRA was detrimental to a defendant, and coupled with the fact that the criminal activity occurred prior to its enactment, could not be applied because it would violate the Ex Post Facto Clause of the United States Constitution.

In the instant case, the detrimental effect of the MVRA upon the defendant, Chaney L. Phillips, is more pronounced. Accepting *arguendo* the government's position, that the MVRA allows the United States government

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[7] 18 U.S.C.A. § 3663(a)(1)(A)

[8] 18 U.S.C.A. § 3664(f)(1)(A)

to enforce restitution orders in favor of private entities, the government can, as it has here, proceed with a writ of garnishment against the retirement fund of Phillips, inasmuch as it is not exempt under federal law.[9] However, if the MVRA cannot be employed to enforce such a restitution order, the defendant's retirement fund would be exempt from seizure.[10]

## CONCLUSION

Given the rising emphasis of the state and national laws providing for victim restitution, it is obvious the issues presented here are of great national importance. It can only be assumed that the federal government, armed with the decision of the Fifth Circuit Court of Appeals in the instant case will proceed post haste with enforcing restitution orders on behalf of private entities through the Federal Debt Collection Procedures Act. Whether or not the government can do so is an issue conflicted between the United States Court of Appeals for the Fifth Circuit[11] and the United States Court of Appeals for the First Circuit.[12] Given the obvious national importance of this issue, coupled with the conflicts among circuits, it is respectfully submitted that a writ of certiorari issue.

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[9] 18 U.S.C. § 3613(a)

[10] Louisiana Revised Statute 13:3881D(1)

[11] *United States v. Chaney L. Phillips*, 303 F.3d 548 (5th Cir. La.) (July 22, 2002; No. 01-30878)

[12] *United States v. Bongiorno, supra*; *United States v. Rostoff, supra*

Of perhaps more national importance is the issue of whether or not the Mandatory Victims Restitution Act, if applicable, violates the Ex Post Facto Clause in the United States Constitution when applied to criminal activity occurring prior to its adoption on April 24, 1996. Again, as pointed out above, this issue is conflicted among the various circuit courts, the opinion of the Fifth Circuit Court of Appeals in the instant case being contrary to the majority of the circuits. Again, for the reasons expressed throughout, it is respectfully submitted that a writ of certiorari issue.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 01-30878

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UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

CHANEY L. PHILLIPS, Defendant-Appellant,

consolidated w/

IN RE: SUCCESSION OF STANLEY E. HORNSBY.

(Filed Jul. 22, 2002)

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Appeal from the United States District Court
for the Middle District of Louisiana

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Before POLITZ, STEWART and CLEMENT, Circuit Judges.*

CARL E. STEWART, Circuit Judge:**

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* Judge Politz was a member of the panel that heard oral arguments. However, due to his death on May 25, 2002, he did not participate in this decision. This case is being decided by a quorum pursuant to 28 U.S.C. § 46(d) (1996).

** Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Chaney L. Phillips ("Phillips") appeals from the denial of his motion to discharge a garnishment. Finding no error, we affirm.

## FACTUAL AND PROCEDURAL HISTORY

A federal jury convicted Chaney Phillips on multiple felony counts for which he was incarcerated, and ordered him to pay victim restitution in the amount of $217,587.56. In February 1999, the Government used the Federal Debt Collection Procedures Act's post-judgment collection remedies to seek writs of garnishment against Phillips' successor interest in the estate of Stanley Hornsby.[1] It also served Phillips notice on August 22, 1999 that it would garnish his retirement account. When Phillips did not request a hearing, the district court entered the garnishment order against Phillips' retirement funds on September 21, 1999. Phillips later moved to discharge the garnishment. The district court found his request was untimely, but denied the motion on the merits. The district court held that the Mandatory Victims Restitution Act (MVRA) granted the Government the authority to use the collection procedures of the Federal Debt Collection Procedures Act (FDCPA) to enforce victim restitution orders in favor of a private party.[2]

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[1] The action was called *United States v. Phillips*. The District Court consolidated the *Phillips* garnishment action with the *In re Hornsby* succession action in June of 1999.

[2] The payments were in favor of Sun Life Assurance Company, the St. Helena Parish Assessor's Office, and the Louisiana Assessors Insurance Fund. We also note that the original payment Phillips owed

(Continued on following page)

Phillips filed a timely appeal under 28 U.S.C. § 1292, but in an unpublished decision, we dismissed his appeal for lack of jurisdiction; the district court's order was non-final and non-appealable because there was a still-pending claim in the *Hornsby* action and the district court had not certified a partial final judgment under Federal Rule Civil Procedure 54(b). In June 2001, however, the district court granted Phillips' subsequent Rule 54(b) motion for partial final judgment.

## JURISDICTION

We have jurisdiction over the district court's Rule 54(b) partial judgment under 28 U.S.C. § 1291 because it disposed of a distinct claim for relief. Under *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737 (5th Cir. 2000), we have appellate jurisdiction under § 1291 where the district court entered judgment on a distinct "claim" for relief that meets the finality requirement of § 1291 and there is no just reason for delay. 207 F.3d at 740 & n.2. The district court's judgment meets these criteria. The garnishment of the retirement account is a distinct "claim" under Rule 54(b). Although it is not entirely clear what constitutes a "claim" for relief, the retirement garnishment is, in any case, a totally separate claim from the garnishment of the inheritance; the Government could have pursued the retirement garnishment without violating the rule against splitting claims. *Id.* In addition, while the inheritance claim is still pending in district court, the garnishment of

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was $225,587.56, but was reduced after an appeal to the Court and a remand.

the retirement funds is complete; the garnishment order directs immediate payment of the retirement funds. Thus, there is nothing left to resolve, the judgment is final, there is no just reason for delay and jurisdiction is proper under Rule 54(b) and § 1291.

## STANDARD OF REVIEW

We review the district court's statutory construction *de novo*. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir. 2000).

## DISCUSSION

Phillips contends that the FDCPA grants the government authority to enforce restitution in favor of the United States, but not to enforce restitution in favor of a private party. He bases this contention on the fact that the FDCPA defines "debt" as "an amount that is owing to the United States." 28 U.S.C. § 3002(3) (2000). Restitution in favor of a private party, he asserts, is not an amount owed to the United States.[3] Furthermore, he contends, contrary to the district court's holding, the MVRA did not change this definition. No MVRA language, he asserts, grants the

[3] Appellant relies principally upon *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), in which our sister circuit held that the federal government could not collect certain child support payments via the FDCPA because the debt was "not owed to the United States in an economically meaningful sense." *Id.* at 1039. Although the case was decided after the effective date of the MVRA, the *Bongiorno* court did not discuss the MVRA at all. Accordingly, we do not find *Bongiorno* to be persuasive authority in the present case.

government authority to collect restitution on behalf of a private entity.

We find, however, that the district court correctly concluded that it can enforce private restitution actions through the FDCPA. The MVRA provides the Government authority to enforce victim restitution orders in the same manner that it recovers fines and by all other available means. 18 U.S.C. § 3664(m)(1)(A)(i)-(ii) (2000). The Government is authorized under 18 U.S.C. § 3613(a) (2000) to collect criminal fines and restitution "in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law." The federal law that provides the practices and procedures for the enforcement of a civil judgment is the FDCPA. 28 U.S.C. §§ 3001-3308 (1994). We find it clear that the plain language of the MVRA authorized the Government to garnish accounts for victim restitution to be paid to private individuals.

In addition, this conclusion is well supported. Under the MVRA, the attorney general is required to enforce a victim restitution order. 18 U.S.C. § 3612(c). Congress directed the attorney general to aggressively enforce restitution orders with the "inten[t] that the Department [of Justice would] commit the resources necessary to ensure that the rights of victims are enforced." Victim Restitution Act of 1995, Pub. L. No. 104-132, at 23, 1996 U.S.C.C.A.N. 924, 936. The legislative history further shows that the MVRA was drafted to "strengthen the ability of the Government to collect" criminal restitution; it "consolidat[ed] the procedures for the collection of unpaid restitution with existing procedures for the [Government's] collection of unpaid fines" and simultaneously "strengthen[ed] these procedures." *Id.* at 13-14, 22. The

FDCPA provides the most effective means for the Government to enforce private victim restitution orders because it provides a uniform system for prosecutors to follow rather than resorting to the non-uniform procedures provided by the states. It is absurd to suggest that while the Government drafted the MVRA to make it easier for private victims to collect restitution, that it did not also provide the simplest and most uniform means for the attorney general to collect that restitution. Our review of the statutory language and legislative history persuades us beyond peradventure, therefore, that Congress drafted the MVRA with the intent that it would allow prosecutors to utilize the FDCPA to collect restitution in favor of private victims.

Appellant also argues that applying the MVRA to criminal acts before the MVRA's effective date violates the *Ex Post Facto* Clause. We disagree. The MVRA merely affects how appellant's punishment is collected; it does not increase appellant's punishment. *Creel v. Kyle,* 42 F.3d 955, 958 (5th Cir. 1995) (holding that "procedural changes, even if they work to the disadvantage of a criminal defendant, do not violate the *Ex Post Facto* Clause.").

## CONCLUSION

For the foregoing reasons, we AFFIRM.

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

| | |
|---|---|
| IN THE MATTER OF<br>THE SUCCESSION OF<br>STANLEY E. HORNSBY | CIVIL ACTION<br>NO. 99-91-D-M |

CONSOLIDATED WITH

| | |
|---|---|
| UNITED STATES<br>OF AMERICA<br><br>VERSUS<br><br>CHANEY L. PHILLIPS | CRIMINAL ACTION<br><br>NO. 97-68-B |

**ORDER AND JUDGMENT**

(Filed June 13, 2001)

Defendant having filed a motion for certification under Fed. Rule Civ. P. 54(b) and the government having stated in court this day that it has no objection to the motion; and the Fifth Circuit having dismissed a prior appeal taken by Chaney Phillips for lack of compliance with Rule 54(b); and the court finding that said motion may perhaps be more properly treated as a motion for certification under 28 U.S.C. §1292 as it apparently involves an interlocutory ruling; and the court further finding that said order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the litigation;

IT IS ORDERED that the court's ruling of June 29, 2000, involves a controlling question of law as to which there is substantial ground for difference of opinion and

that immediate appeal from the order may materially advance the ultimate termination of the litigation;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is no just reason for delay and that a final judgment be and is hereby entered as to the court's ruling denying defendant's motion to discharge garnishment.

Baton Rouge, Louisiana, this 13th day of June, 2001.

/s/ J Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT
OF LOUISIANA

USCA CONST Art. I § 9, cl. 3
U.S.C.A. Const. Art. I § 9, cl. 3

**UNITED STATES CODE ANNOTATED**
**CONSTITUTION OF THE UNITED STATES**
**ARTICLE I - THE CONGRESS**

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Current through P.L. 107-227
(excluding 107-217), approved 9-25-02

**Section 9. Clause 3, Bills of Attainder and Ex Post Facto Laws**

No Bill of Attainder or ex post facto Law shall be passed.

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28 USCA § 3014
28 U.S.C.A. § 3014

**UNITED STATES CODE ANNOTATED TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE**
**PART VI - PARTICULAR PROCEEDINGS CHAPTER 176 - FEDERAL DEBT COLLECTION PROCEDURE SUBCHAPTER A - DEFINITIONS AND GENERAL PROVISIONS**

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Current through P.L. 107-227
(excluding 107-217), approved 9-25-02

**§ 3014. Exempt property**

**(a) Election to exempt property.** – An individual debtor may, in an action or proceeding under this chapter,

elect to exempt property listed in either paragraph (1) or, in the alternative, paragraph (2). If such action or proceeding is against debtors who are husband and wife, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2). If the debtors cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1). Such property is either –

**(1)** property that is specified in section 522(d) of title 11, as amended from time to time; or

**(2)(A)** any property that is exempt under Federal law, other than paragraph (1), or State or local law that is applicable on the date of the filing of the application for a remedy under this chapter at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of such application, or for a longer portion of such 180-day period than in any other place; and

**(B)** any interest in property in which the debtor had, immediately before the filing of such application, an interest as a tenant by the entirety or joint tenant, or an interest in a community estate, to the extent that such interest is exempt from process under applicable nonbankruptcy law.

**(b) Effect on assertion and manner of determination. –**

**(1) Statement.** – A court may order the debtor to file a statement with regard to any claimed exemption. A copy of such statement shall be served on counsel for the untied states. Such statement shall be under oath and shall describe each item of property for which exemption is

claimed, the value and the basis for such valuation, and the nature of the debtor's ownership interest.

**(2) Hearing.** – The United States or the debtor, by application to the court in which an action or proceeding under this chapter is pending, may request a hearing on the applicability of any exemption claimed by the debtor. The court shall determine the extent (if any) to which the exemption applies. Unless it is reasonably evident that the exemption applies, the debtor shall bear the burden of persuasion.

**(3) Stay of disposition.** – Assertion of an exemption shall prevent the United States from selling or otherwise disposing of the property for which such exemption is claimed until the court determines whether the debtor has a substantial nonexempt interest in such property. The United States may not take possession of, dispose of, sell, or otherwise interfere with the debtor's normal use and enjoyment of an interest in property the Untied States knows or has reason to know is exempt.

**(c) Debtors in joint cases.** – Subject to the limitation in subsection (a), this section shall apply separately with respect to each debtor in a joint case.

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18 USCA § 3663
18 U.S.C.A. § 3663

**UNITED STATES CODE ANNOTATED TITLE 18, CRIMES AND CRIMINAL PROCEDURE PART II – CRIMINAL PROCEDURE CHAPTER 232 – MISCELLANEOUS SENTENCING PROVISIONS**

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Current through P.L. 107-227
(excluding 107-217), approved 9-25-02

## § 3663. Order of restitution

**(a)(1)(A)** The court when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (*21 U.S.C. 841, 848(a), 849, 856, 861, 863*) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

**(B)(i)** The court, in determining whether to order restitution under this section, shall consider –

**(I)** the amount of the loss sustained by each victim as a result of the offense; and

**(II)** the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

**(ii)** To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

**(2)** For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

**(3)** The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

**(b)** The order may require that such defendant –

**(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

**(A)** return the property to the owner of the property or someone designated by the owner; or

**(B)** if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

**(i)** the value of the property on the date of the damage, loss, or destruction, or

**(ii)** the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

**(2)** in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 –

**(A)** pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

**(B)** pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

**(C)** reimburse the victim for income lost by such victim as a result of such offense;

**(3)** in the case of [sic] an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

**(4)** in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

**(5)** in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

**(c)(1)** Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii),[1] when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (*21 U.S.C. 841, 848(a), 849, 856, 861, 863*), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

**(2)(A)** An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

**(B)** In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

**(3)** Restitution under this subsection shall be distributed as follows:

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[1] So in original. Probably should be "(ii))".

**(A)** 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

**(B)** 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

**(4)** The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (*21 U.S.C. 801* et seq.).

**(5)** Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

**(6)** Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

**(7)(A)** The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

**(B)** No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

**(d)** An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

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18 USCA § 3664
18 U.S.C.A. § 3664

**UNITED STATES CODE ANNOTATED**
**TITLE 18. CRIMES AND CRIMINAL PROCEDURE**
**PART II – CRIMINAL PROCEDURE**
**CHAPTER 232 – MISCELLANEOUS SENTENCING PROVISIONS**

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Current through P.L. 107-227 (excluding 107-217), approved 9-25-02

§ 3663. Procedure for issuance and enforcement of order of restitution

**(a)** For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

**(b)** The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

**(c)** The provisions of this chapter, chapter 227, Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

**(d)(1)** Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

**(2)** The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

**(A)** provide notice to all identified victims of –

**(i)** the offense or offenses of which the defendant was convicted;

**(ii)** the amounts subject to restitution submitted to the probation officer;

**(iii)** the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

**(iv)** the scheduled date, time, and place of the sentencing hearing;

**(v)** the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

**(vi)** the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

**(B)** provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

**(3)** Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

**(4)** After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

**(5)** If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

**(6)** The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and

recommendations as to disposition, subject to a de novo determination of the issue by the court.

**(e)** Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

**(f)(1)(A)** In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

**(B)** In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

**(2)** Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

**(A)** the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

**(B)** projected earnings and other income of the defendant; and

**(C)** any financial obligations of the defendant; including obligations to dependents.

**(3)(A)** A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

**(B)** A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

**(4)** An in-kind payment described in paragraph (3) may be in the form of –

**(A)** return of property;

**(B)** replacement of property; or

**(C)** if the victim agrees, services rendered to the victim or a person or organization other than the victim.

**(g)(1)** No victim shall be required to participate in any phase of a restitution order.

**(2)** A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

**(h)** If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

**(i)** If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

**(j)(1)** If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

**(2)** Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in –

**(A)** any Federal civil proceeding; and

**(B)** any State civil proceeding, to the extent provided by the law of the State.

**(k)** A restitution order shall provide that the defendant shall notify the court and the Attorney General of

any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

**(l)** A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

**(m)(1)(A)(i)** An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

**(ii)** by all other available and reasonable means.

**(B)** At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant

located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

**(2)** An order of in-kind restitution in the form of services shall be enforced by the probation officer.

**(n)** If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

**(o)** A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

**(1)** such a sentence can subsequently be –

**(A)** corrected under *Rule 35 of the Federal Rules of Criminal Procedure* and section 3742 of chapter 235 of this title;

**(B)** appealed and modified under section 3742;

**(C)** amended under section 3664(d)(3); or

**(D)** adjusted under section 3664(k), 3572, or 3613A; or

**(2)** the defendant may be resentenced under section 3565 or 3614.

**(p)** Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person

against the United States or any officer or employee of the United States.

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18 USCA § 3613
18 U.S.C.A. § 3613

**UNITED STATES CODE ANNOTATED**
**TITLE 18. CRIMES AND CRIMINAL PROCEDURE**
**PART II – CRIMINAL PROCEDURE**
**CHAPTER 229 – POSTSENTENCE ADMINISTRATION**
**SUBCHAPTER B – FINES**

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Current through P.L. 107-227 (excluding
107-217), approved 9-25-02

§ 3613. Civil remedies for satisfaction of an unpaid fine

**(a) Enforcement.** – The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that –

**(1)** property exempt from levy for taxes pursuant to *section 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986* shall be exempt from enforcement of the judgment under federal law;

**(2)** section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and

**(3)** the provisions of section 303 of the Consumer Credit Protection Act (*15 U.S.C. 1673*) shall apply to enforcement of the judgment under Federal law or State law.

**(b) Termination of liability.** – The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined.

**(c) Lien.** – A fine imposed pursuant to the provisions of subchapter C of chapter 227 of this title, or an order of restitution made pursuant to sections[1] 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

**(d) Effect of filing notice of lien.** – Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under *section 6323(f)(1) and (2) of the Internal Revenue Code of 1986*, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of *section 6323 of the Internal Revenue*

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[1] So in original. Probably should be "section".

*Code of 1986* for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.

**(e) Discharge of debt inapplicable.** – No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.

**(f) Applicability to order of restitution.** – In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.

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LA R.S. 13:3881
LSA-R.S. 13:3881

**WEST'S LOUISIANA STATUTES ANNOTATED**
**LOUISIANA REVISED STATUTES**
**TITLE 13. COURTS AND JUDICIAL PROCEDURE**
**CHAPTER 18. SEIZURES IN GENERAL**

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Current through all 2001 Regular and
Second Extraordinary Session Acts

§ 3881. General exemptions from seizure

A. The following income or property of a debtor is exempt from seizure under any writ, mandate, or process whatsoever:

(1)(a) Seventy-five percent of his disposable earnings for any week, but in no case shall this exemption be less than an amount in disposable earnings which is equal to thirty times the federal minimum hourly wage in effect at the time the earnings are payable or a multiple or fraction thereof, according to whether the employee's pay period is greater or less than one week. However, the exemption from disposable earnings for the payment of a current or past due support obligation, or both, for a child or children is fifty percent of disposable earnings, and the exemption from seizure of the disposable earnings for the payment of a current or past due support obligation, or both, for a spouse or former spouse is sixty percent of the disposable earnings. For purposes of this Subsection, if the Department of Social Services is providing support enforcement services to the spouse and a judgment or order for support includes an obligation for both a child or children and a spouse or former spouse, or in any case wherein the

judgment or order does not clearly indicate which amount is attributable to support of the child or children and which amount is attributable to support of the spouse or former spouse, the support obligation shall be treated as if it is exclusively for the support of a child or children.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any mounts required by law to be withheld and which amounts are reasonable and are being deducted in the usual course of business at the time the garnishment is served upon the employer for the purpose of providing benefits for retirement, medical insurance coverage, life insurance coverage and which amounts are legally due or owed to the employer in the usual course of business at the time the garnishment is served.

(2) That property necessary to the exercise of a trade, calling, or profession by which he earns his livelihood, which shall be limited to the following:

(a) Tools.

(b) Instruments.

(c) Books.

(d) One pickup truck with a gross weight of less than three tons, or one motor vehicle, which does not possess any of the characteristics of a luxury automobile as defined under *R.S. 39:365(B)* which also shall not be a vehicle used solely for transportation to and from the place at which the debtor earns his livelihood; and

(e) One utility trailer.

(3) The personal servitude of habitation and the usufruct under *Article 223 of the Civil Code*.

(4)(a) The clothing, bedding, linen, chinaware, nonsterling silverware, glassware, living room, bedroom, and dining room furniture, cooking stove, heating and cooling equipment, one noncommercial sewing machine, equipment for required therapy, kitchen utensils, pressing irons, washers, dryers, refrigerators, deep freezers, electric or otherwise, used by him or a member of his family.

(b) The family portraits.

(c) His arms and military accoutrements.

(d) The musical instruments played or practiced on by him or a member of his family.

(e) The poultry, fowl, and one cow kept by him for the use of his family.

(f) All dogs, cats, and other household pets.

(5) Any wedding or engagement rings worn by either spouse, provided the value of the ring does not exceed five thousand dollars.

B. (1) In cases instituted under the provisions of Title 11 of the United States Code, entitled "Bankruptcy", there shall be exempt from the property of the estate of an individual debtor only that property and income which is exempt under the laws of the state of Louisiana and under federal laws other than Subsection (d) of Section 522 of said Title 11 of the United States Code.

(2) No property upon which a debtor has voluntarily granted a lien shall, to the extent of the balance due on the debt secured thereby, be subject to the provisions of this

Chapter or be exempt from forced sale under process of law.

(3) Proceeds from the involuntary sale or distribution of personal property that is exempt from seizure under the laws of this state made at or after the filing of a petition under any Chapter of Title 11 of the United States Code, shall remain exempt for purposes of state law exemptions, as applicable under *11 U.S.C.A. § 522(b)(2)(A)*. For purposes of this Subsection, "involuntary sale" shall mean any non-consensual sale or disposition of property.

C. The state of Louisiana expressly waives any immunity from suit insofar as the garnishment of the nonexempt portion of the wages, salaries, commissions, or other compensation of public officials, whether elected or appointed, public employees, or contractors is concerned, of itself, its agencies, boards, commissions, political subdivisions, public corporations, and municipal corporations.

D. (1) Except as provided in Paragraph 2 of this Subsection, the following shall be exempt from all liability for any debt except alimony and child support; all pensions, all tax-deferred arrangements, annuity contracts, and all proceeds of and payments under all tax-deferred arrangements and annuity contracts, as defined in Paragraph 3 of this Subsection.

(2) No contribution to a tax-deferred arrangement or to an annuity contract, as defined in Paragraph 3 of this Subsection, shall be exempt if made less than one calendar year of [sic] the date of filing for bankruptcy, whether voluntary or involuntary, or the date writs of seizure are filed against the tax-deferred arrangement or annuity contract. A transfer from one tax-deferred arrangement to

another or from one annuity contract to another shall not be considered a contribution for purposes of this Paragraph.

(3) The term "tax-deferred arrangement" includes all individual retirement accounts or individual retirement annuities of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law, including balances rolled over from any other tax-deferred arrangement as defined herein, money purchase pension plans, defined benefit plans, defined contribution plans, Keogh plans, simplified employee pension (SEP) plans, simple retirement account (SIMPLE) plans, or any other plan of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law, under which United States income tax on the tax-deferred arrangement is deferred. The term "annuity contract" shall have the same definition as defined in *R.S. 22:647(B)*.

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JAN 22 2003
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No. 02-617

# In the Supreme Court of the United States

CHANEY L. PHILLIPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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HPP

## QUESTIONS PRESENTED

1. Whether, under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1227-1241, the United States may use the remedies provided by the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, to enforce a victim restitution order that was entered as part of the criminal judgment in a federal prosecution.

2. Whether the retroactive application of provisions of the Mandatory Victims Restitution Act of 1996, which alter the procedural mechanisms for enforcing restitution orders but do not affect a defendant's substantive liability for restitution, violate the Ex Post Facto Clause.

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# In the Supreme Court of the United States

No. 02-617

CHANEY L. PHILLIPS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 303 F.3d 548. The opinion of the district court is unreported and is omitted from petitioner's appendix, but is reproduced at App., *infra*, 1a-2a. The order of the district court certifying its judgment for appeal under Federal Rule of Civil Procedure 54(b) (Pet. App. 7-8) is also unreported.

### JURISDICTION

The court of appeals entered its judgment on July 22, 2002. The petition for a writ of certiorari was filed on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of six counts of mail fraud, in violation of 18 U.S.C. 1341, one count of engaging in an illegal monetary transaction, in violation of 18 U.S.C. 1957, and conspiracy to commit each of those crimes. See *United States* v. *Phillips*, 219 F.3d 404 (5th Cir. 2000). In addition to imposing a term of incarceration, the district court ordered petitioner to pay victim restitution in the amount of $217,587.56. Pursuant to the restitution order, the United States sought a writ of garnishment against petitioner's interest in an estate and against his retirement account. The district court denied petitioner's motion to discharge the garnishment. The court of appeals affirmed.

1. The Mandatory Victims Restitution Act of 1996 (Restitution Act), Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1227-1241, made victim restitution a mandatory component of the sentence for many federal crimes and provided for enhanced post-conviction enforcement of such orders by the federal government. 18 U.S.C. 3663A, 3664. Before the Restitution Act, restitution orders in federal criminal sentences could be enforced by either the crime victim or the United States. 18 U.S.C. 3663(h) (1994). The Restitution Act strengthened enforcement by providing that the Attorney General "shall be responsible for collection of an unpaid fine or restitution," including victim restitution, 18 U.S.C. 3612(c), and directing the Attorney General to promulgate guidelines to ensure that restitution orders are enforced "to the fullest extent of the law," 18 U.S.C. 3551 note. The Restitution Act further provides that the entry of a restitution order as part of a criminal

judgment vests in the United States a property right in the defendant's assets, such that "an order of restitution * * * is a lien in favor of the United States" on all of the defendant's property and rights to property. 18 U.S.C. 3613(c). In addition, the Restitution Act requires defendants to make their restitution payments to the court, rather than to the victim. 18 U.S.C. 3611.

The Restitution Act empowers the Attorney General to enforce victim restitution orders in the same manner that it collects fines, under 18 U.S.C. 3571-3574 and 3611-3614, and "by all other available and reasonable means," 18 U.S.C. 3664(m)(1)(A)(ii). See also 18 U.S.C. 3613(f) ("all provisions of this section [pertaining to the enforcement of fines] are available to the United States for the enforcement of an order of restitution"). Accordingly, under the Restitution Act, the Attorney General may enforce a restitution order "in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law." 18 U.S.C. 3613(a) (made applicable to restitution orders by 18 U.S.C. 3664(m)(1)(A)). The practices and procedures for enforcement of a civil judgment under federal law, in turn, are set forth, *inter alia*, in the Federal Debt Collection Procedures Act of 1990 (Collection Act), 28 U.S.C. 3001 *et seq.* Those procedures include the use of garnishment. 28 U.S.C. 3205.

2. Following entry of his felony convictions, petitioner was ordered to pay victim restitution to the Sun Life Assurance Company, the St. Helena Parish Assessor's Office, and the Louisiana Assessors Insurance Fund in the amount of $217,587.56. In February 1999, the United States sought writs of garnishment, pursuant to the Collection Act, against petitioner's interest in an estate and his retirement account. Pet. App. 2. Petitioner did not request a hearing, and the

district court entered a garnishment order against petitioner's retirement account. The district court denied petitioner's subsequent motion to discharge the garnishment order, App., *infra*, 1a-2a, on the ground that the Restitution Act granted the United States the authority to use the garnishment procedures of the Collection Act to enforce victim restitution orders, *id.* at 2a.

3. Petitioner's initial appeal was dismissed for lack of a final judgment. Pet. App. 3. Following the district court's certification of its judgment for appeal under Federal Rule of Civil Procedure 54(b), petitioner again appealed, and the court of appeals affirmed. Pet. App. 1-6. The court of appeals rejected petitioner's argument that the United States could not use the Collection Act to enforce a victim restitution order. The court found it "clear that the plain language of the [Restitution Act] authorized the Government to garnish accounts for victim restitution to be paid to private parties." *Id.* at 5. The court found further support for its conclusion in the legislative history, concluding that "the statutory language and legislative history persuade[] us beyond peradventure * * * that Congress drafted the [Restitution Act] with the intent that it would allow prosecutors to utilize the [Collection Act] to collect restitution in favor of private victims." *Id.* at 6.

The court of appeals also rejected petitioner's argument that application of the Restitution Act's procedural mechanisms for the enforcement of restitution orders to crimes committed before the Restitution Act's effective date violates the Ex Post Facto Clause. The court explained that the Restitution Act affects only how petitioner's sentence is procedurally enforced;

it does not increase petitioner's punishment. Pet. App. 6.

## ARGUMENT

1. Petitioner contends (Pet. 4-8) that the court of appeals' holding that the United States may use the procedures of the Collection Act to enforce victim restitution orders is incorrect and conflicts with decisions of the First Circuit. Petitioner is wrong on both counts.

First, the plain language of the Restitution Act permits the use of Collection Act procedures to enforce victim restitution orders. As the court of appeals explained (Pet. App. 5), the Restitution Act expressly empowers the Attorney General to enforce victim restitution orders in the same manner that he recovers criminal fines or by any means available under federal and state law to enforce a civil judgment. 18 U.S.C. 3664(m)(1)(A); see also 18 U.S.C. 3613(f). The principal means for collection of fines and enforcement of other civil judgments by the United States are the procedures established by the Collection Act, 28 U.S.C. 3001 *et seq.*, which the Restitution Act expressly incorporates, 18 U.S.C. 3664(m)(1)(A). Petitioner's arguments (Pet. 5) that victim restitution orders are not "debts" "owed to the United States," within the meaning of the Collection Act, thus cannot be reconciled with Congress's expansion of the Collection Act's scope through the Restitution Act.

Second, the First Circuit's decisions in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997), and *United States* v. *Rostoff*, 164 F.3d 63 (1999), are not to the contrary. *Bongiorno* involved the enforcement of a child support order under the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403, not a restitution order under the Restitution Act. 106 F.3d at 1035-1040.

Furthermore, the *Bongiorno* court had no occasion to address the Restitution Act and its expansion of the scope of the Collection Act because the conviction in *Bongiorno* occurred before the Restitution Act's effective date. *Id.* at 1029-1030; see also Pet. App. 4 n.3 (noting that the *Bongiorno* court "did not discuss the [Restitution Act] at all").

In addition, *United States* v. *Rostoff*, *supra*, has no relevance to this case. In that case, the First Circuit held only that a restitution order in favor of the Federal Deposit Insurance Corporation is a "debt[] owed *to the United States*" under the Collection Act. 164 F.3d at 69.

2. Petitioner's argument (Pet. 8-11) that application of the Restitution Act's enforcement provisions violates the Ex Post Facto Clause, U.S. Const., Art. I, § 9, Cl. 3, does not merit further review. Congress applied the Restitution Act to all cases in which convictions are obtained on or after April 24, 1996, the effective date of the Act. See Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 211, 110 Stat. 1241 (The Act "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment."). Petitioner was convicted on August 3, 1998, rendering the Restitution Act applicable to his sentencing.

Although the Restitution Act applies retroactively to petitioner's case, it does not implicate the Ex Post Facto Clause. With respect to criminal punishments, the Ex Post Facto Clause proscribes only laws that "change[] the punishment [for a criminal act], and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.) (emphasis omitted). As

the court of appeals explained (Pet. App. 6), application of the Restitution Act's enhanced procedures for enforcement of the restitution order do not implicate those limitations. The Restitution Act's enforcement provisions did not alter petitioner's liability for restitution or enhance the amount imposed. They simply ensure that the sentence imposed will be more effectively enforced. Enhancements in the government's ability to carry out a criminal sentence—whether in the form of improved locks on jail cells or improved collection procedures for monetary assessments—do not fall within the prohibitions of the Ex Post Facto Clause. See *California Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 507-508 (1995) (alteration in the procedures to be followed in fixing a parole release date, without a change in the substantive standards for obtaining parole, does not violate the Ex Post Facto Clause).

For that reason, petitioner's claim of a circuit conflict (Pet. 9-10) is unavailing. Each of the cases petitioner cites concerns the retroactive application of different provisions of the Restitution Act that substantively altered defendants' liability for restitution; not one of them found that allowing enforcement of restitution orders under the Collection Act violated the Ex Post Facto Clause.* Indeed, in *United States* v. *Baggett*, 125

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* See *United States* v. *Richards*, 204 F.3d 177, 213 (5th Cir.) (provision requiring the court to set restitution at the full amount of victim loss, regardless of defendant's ability to pay, violates the Ex Post Facto Clause when applied to crimes committed before the Restitution Act's effective date), cert. denied, 531 U.S. 826 (2000); *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998) (shift from discretionary to mandatory restitution retroactively increases punishment, in violation of the Ex Post Facto Clause); *United States* v. *Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998) (same); *United States* v. *Rezaq*, 134 F.3d 1121, 1140-1141 & n.13 (D.C. Cir.)

F.3d 1319 (9th Cir. 1997), the Ninth Circuit expressly distinguished substantive alterations in restitution liability, which were subject to the Ex Post Facto Clause's limitations, from procedural changes in the imposition of restitution orders, which were not. *Id.* at 1323. Far from demonstrating an inter-circuit conflict, *Baggett* thus supports the court of appeals' decision in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2003

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(same), cert. denied, 525 U.S. 834 (1998); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (same) (dicta); *United States* v. *Baggett*, 125 F.3d 1319, 1322-1323 (9th Cir. 1997) (same); *United States* v. *Thompson*, 113 F.3d 13, 15 & n.1 (2d Cir. 1997) (same).

**APPENDIX**

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA

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Civil Action No. 99-91-D

IN THE MATTER OF THE SUCCESSION OF
STANLEY E. HORNSBY

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CONSOLIDATED FOR GARNISHMENT
PROCEEDINGS WITH

Criminal Action No. 99-91-B

UNITED STATES OF AMERICA

*v.*

CHANEY L. PHILLIPS

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[Filed: June 29, 2000]

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**RULING ON MOTION TO DISCHARGE GARNISHMENT**

This matter is before the court on a motion by defendant, Chaney L. Phillips, to discharge garnishment. The government has filed an opposition; defendant has filed a reply brief; and the government has filed a supplemental opposition. There is no need for oral argument.[†]

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[†] To the extent that defendant requests a hearing on the matter, the court agrees with the government that such request is un-

On October 20, 1999, defendant filed a motion "to discharge garnishment" on the grounds that the government lacks the authority to enforce a criminal restitution order by using the collection remedies set forth in the Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. §§ 3001-3308. Defendant cites case law to the effect that the government may not use the FDCPA to collect a debt owed to a private entity. There is no dispute that the restitution owed by defendant is payable to private victims.

In opposition, the government persuasively argues that the FDCPA should be read in conjunction with the Mandatory Victims Restitution Act of 1996 ("MVRA"). Consequently, the cases cited by defendant, which do not discuss the MVRA, are inapposite. For the reasons stated by the government in its briefs, the court finds that the motion to discharge garnishment lacks merit.

Accordingly, the motion by defendant (doc. 58) to discharge garnishment is hereby DENIED.

Baton Rouge, Louisiana, June 29, 2000.

/s/ JAMES J. BRADY
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

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timely. Moveover, the sole issue is one of law, which the court readily disposes with herein.